[HIGH COURT OF AUSTRALIA.]

PETER JOSEPH RUBIE . . . . APPELLANT;
RESPONDENT,

AND

JOSEPHINE CLARA RUBIE . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

SYDNEY, *Dec.* 20, 21.

Griffith C.J., Barton and O'Connor JJ.

Husband and wife—Divorce—Attachment—Disobedience of order for payment of maintenance — Order irregularly made — Order for maintenance in decree absolute—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14), *secs.* 39, 40—*Divorce Rules of October* 27, 1892, rr. 119, 135, 136.

In October 1901 a petition for divorce was filed against the appellant by the respondent, his wife. The petition, which was personally served upon the appellant, contained a prayer for permanent alimony. The appellant did not enter any appearance in the suit, and, in November 1901, a decree *nisi* was granted directing the appellant to pay a periodical sum for maintenance. The decree *nisi* was served upon the appellant, and, in January 1902, was made absolute. The decree absolute contained an order for payment of maintenance in the same terms as had been provided in the decree *nisi*. The appellant subsequently married again. In December 1910, the decree absolute was served upon the appellant, and an order of attachment was made against him for non-payment of maintenance due under this decree since the date of service.

Held, that under sec. 40 of the *Matrimonial Causes Act* 1899, and Rule 119 of 27th October 1892, an independent application should have been made for permanent maintenance by the respondent, and that the inclusion of such an order in the decree absolute was an irregularity. But *held*, also, that under all the circumstances the order so made was within the jurisdiction of the Court and was not contrary to natural justice, that it was too late to take advantage of the irregularity, and that attachment was properly granted for disobedience of the order.

There is a distinction, so far as regards the discretion of the Court to grant or refuse an attachment, between disobedience to an injunction against doing an act and disobedience to an order to do an act.

Decision of *Gordon* J., May 2nd 1911, affirmed.

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APPEAL from the Supreme Court (*Gordon J.*).

In October 1901 the respondent filed a petition for divorce against the appellant. The petition contained (*inter alia*), a prayer for permanent alimony. This petition was personally served upon the appellant, but no appearance was entered in the suit, nor did the appellant appear at the hearing. In November 1901 a decree *nisi* was granted for dissolution of the marriage and the appellant was directed to pay a periodical sum for the permanent maintenance of his wife. The decree *nisi* was duly served upon the appellant, and in January 1902 the decree was made absolute. The decree absolute contained a similar order for payment of permanent maintenance to the wife. The decree absolute was not then served upon the appellant, but he was apparently aware of it as he had since married again. The appellant subsequently to the decree absolute had made payments by way of maintenance to his wife, and had attempted to compromise her claim for maintenace. In July 1910 an application was made by the wife to attach the appellant for disobedience of the order for permanent maintenance contained in the decree *nisi*. This was dismissed: *Rubie* v. *Rubie* (1). In December 1910 the decree absolute was served upon the appellant, and in March 1911 an application was made to attach the appellant for disobedience of the order for payment of maintenance contained in this decree. At the hearing the claim was limited to payment of the amount due since the date of service of the decree absolute.

Gordon J., being satisfied that the appellant could comply with the order, and was wilfully refusing to do so, made an order for the attachment of the appellant under sec. 90 of the *Matrimonial Causes Act* 1899. From this order the appellant by special leave appealed to the High Court on the ground that the Court had no jurisdiction to make the order for permanent maintenance without notice being given to the appellant.

(1) 27 W.N. (N.S.W.), 119.

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Perry, for the appellant. The decree absolute, so far as it directed the appellant to pay maintenance, was a nullity. By sec. 39 of the *Matrimonial Causes Act* 1899, the Court on any decree for dissolution may order the husband to secure to the wife a gross or annual sum of money. "On any decree" means within a reasonable time after the decree. The application for permanent alimony or maintenance must be made by petition after decree *nisi*: Rules 135, 136 of 27th October 1892. No petition was taken out in this case as required by these rules. The application for alimony or maintenance is a distinct proceeding from the application for dissolution of the marriage: *Utick* v. *Utick* (1). If the decree was not a nullity, the order for payment of maintenance was irregularly made, and, as the appellant was entit'ed as of right to have this portion of the order set aside, the Court, in the exercise of its discretion, should have refused to grant an attachment for disobedience of it. Before granting such a summary remedy all the facts should be considered: *Webb* v. *Webb* (2). The law must be strictly complied with in such cases: *Whyte* v. *Whyte* (3).

Monahan, and *Markell*, for the respondent. The order for payment of maintenance in the decree absolute is, at most, an irregularity, and not a nullity, and is good until it is set aside. Under the old r. 119, which was then in force, the wife was entitled to apply for permanent alimony without serving the appellant with notice, as he had failed to enter an appearance in the suit. The appellant has not denied that he was in fact aware of the decree absolute when it was made, and alimony was asked for in the petition which was served upon the appellant. If the order was an irregularity the appellant is barred by his delay. There is no hardship in this case, as the appellant may apply at any time to vary the order and for reduction of the maintenance. The Judge in divorce treated the order as at the worst an irregularity in the proceedings, by which the appellant had not been prejudiced in any way. An order irregularly made may be enforced by attachment. [Reference was made to

(1) 5 C.L.R., 400.
(2) 19 W.N. (N.S.W.), 303.
(3) 24 W.N. (N.S.W.), 61.

Drewry v. *Thacker* (1); *Russell* v. *East Anglian Railway Co.* (2); *Rubie* v. *Rubie* (3); *Backhouse* v. *Moderana* (4).]

Perry, in reply, referred to *Bradley* v. *Bradley* (5).

Cur. adv. vult.

GRIFFITH C.J. This is an appeal from an order of *Gordon* J., directing a writ of attachment to issue against the appellant for non-compliance with an order for payment into Court of permanent maintenance. The order was contained in a decree for dissolution of marriage, which was made absolute in January 1902 at the suit of the present respondent. Objection is taken to the validity of that order on various grounds. It is said, for reasons to which I will afterwards refer, that such an order cannot be embodied in the decree absolute, and that as the present appellant was entitled on other grounds, as of right, to have this portion of the decree set aside, the Court, in the exercise of its discretion, should not have attached the appellant for non-compliance with it. It is contended that, although the fact that a party to a suit disputes the validity of an order made against him does not justify his disobedience of it, yet it may be very material for the Court, in the exercise of its discretion to grant or refuse an attachment, to consider the circumstances under which the order was made. Reference was made to the case of *Drewry* v. *Thacker* (6), in which Lord *Eldon* L.C., referring to the disobedience of an order for injunction, said:—"On an application against persons guilty of a breach of it, the Court would forget its duty, if it did not give to them the benefit of the fact that the order ought not to have been made."

In *Russell* v. *East Anglian Railway Co.* (7), Lord *Truro*, L.C., referring to this passage, said:—"All that I can understand is, that the Court in administering punishment would attend to all the circumstances of the case, and, amongst others, to the circumstances under which the order has been made, but that is

(1) 3 Swans., 529.
(2) 3 Mac. & G., 104.
(3) 27 W.N. (N.S.W.), 119.
(4) 1 C.L.R., 675.
(5) 3 P.D., 47.
(6) 3 Swans., 529, at p. 546.
(7) 3 Mac. & G., 104, at p. 124.

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not at all intended to impugn the general principle that is laid down, that an order once made by this Court must be obeyed. I can only understand the words 'must be obeyed' as meaning that if the order is not obeyed, the party shall be liable to punishment." No one can cavil at that statement of the law. But if a party induces the Court to make an order *per incuriam* which is contrary to natural justice, I think that the Court is not bound to enforce the order by attachment, but may stay its hand until an opportunity has been given to the other party to apply to the Court to set the order aside. In this respect there is a manifest distinction between disobedience to a positive order forbidding the doing of an act, an order which so long as it subsists ought to be obeyed at all costs—and an order to do an act—the consequence of which if done might be irrevocable which order, as afterwards appears to the Court, should not have been made.

This was the case originally presented by the appellant, but it now appears that it is not quite borne out by the facts. The decree *nisi* was pronounced in November 1901, and contained an order for dissolution of the marriage unless cause were shown to the contrary within one month. It also contained an order directing the appellant to pay into Court a weekly sum for the permanent maintenance of the present respondent. In the following January that order was made absolute.

Reliance was placed by Mr. *Perry* upon the Rules of the Divorce Court which were then in force. Rule 135 provides that: "Applications to the Judge to exercise the powers conferred upon him by the 29th, 39th, and 40th sections of the Principal Act may be made by petition supported by affidavits, and the like practice and procedure shall be observed therein as in applications for alimony pending suit." Rule 136 provided: "In applications under section 29 the petition may be filed as soon as a decree *nisi* has been pronounced, but not before." No such petition was filed in this case.

In order to understand the Rules it is necessary to refer to the sections mentioned. Sec. 29 of the Principal Act, 36 Vict. No. 9, provided that on the issue of a decree for dissolution the Court may order the husband to secure to the wife such gross or annual sum of money as under the circumstances it shall deem reasonable,

and may cause a deed or other instrument to be executed by the parties for that purpose. That is not what is ordinarily understood as an order for permanent maintenance. It is a different proceeding altogether, requiring security by deed or in some other way for a permanent allowance for the wife. This is shown clearly by the later words of the section, which authorize the Court to suspend the pronouncing of its decree until the deed shall have been duly executed, showing that it was intended to include the case of security to be given by a husband petitioner as well as a husband respondent.

Then followed a proviso in these terms:—"Provided always that in every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable. Provided also that if the husband shall afterwards from any cause become unable to make such payments, it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid and again to revise the same order wholly or in part as to the Court may seem fit." This is a provision analogous to that contained in the *Deserted Wives' and Childrens' Act.*

I turn now to secs. 39 and 40. Sec. 39 authorized the Court, where a divorce or judicial separation is granted on the ground of the wife's adultery, to order a settlement to be made of the wife's property for the benefit of the innocent party, or the children of the marriage, or either of them. Sec. 40 enabled the Court, after a final degree of nullity or dissolution of marriage, to vary any ante-nuptial or post-nuptial settlements made by the parties.

The provisions of r. 135 appear primarily to have reference to the execution of deeds or other instruments to secure an allowance to the wife. They are also capable, perhaps, of being read as applicable to the proviso to sec. 29.

Rule 119 provided that: "Applications for permanent alimony, or the permanent custody of children, or any matter which must be embodied in a decree absolute for dissolution of marriage, must be made upon motion, of which notice must be served upon the other party, being the husband or wife of the party seeking to

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have a decree made absolute, if such other party shall have entered an appearance, or if the Judge shall so direct."

That is imperative, and exactly covers the case mentioned in the proviso to sec. 29. Rule 135, however, says that such an application may be made by petition supported by affidavits. There is therefore an apparent conflict between the two rules. Reading them together, as we must, if possible, I think r. 119 must be taken to be applicable to applications for permanent alimony ordinarily so called after a decree absolute. That rule dispenses with the necessity of giving notice if no appearance has been entered in the suit. In the present case the appellant did not enter an appearance, so that according to the rule the wife was entitled to apply without notice, on the decree being made absolute, for permanent maintenance; and the objection taken, which is substantially that the order made was against natural justice, because no notice was given, fails.

The Acts in force when these Rules were made were afterwards repealed and re-enacted, and the decree was actually made under the provisions of the *Matrimonial Causes Act* 1899, by which sec. 29 of 36 Vict. No. 9 is divided into two parts. The first part is now sec. 39, which gives power to the Court to compel the husband to secure the payment of a gross or annual sum to the wife. The second part or proviso is now sec. 40 which deals with what is properly called permanent alimony or maintenance. But the old Rules continued in operation, and were expressly preserved by sec. 2 of the present Act, and they were in force when the decree absolute was made. Rule 119, therefore, would apply exactly to the power which the Court could have been asked to exercise under sec. 40 of the present Act. The application could have been made by motion, and it was not necessary to serve notice upon the appellant. It might be unfair to make an order against him unless he had some notice of it. But the decree *nisi* contained an order for payment of permanent maintenance, and that decree was served upon the appellant. It is now admitted that that part of the decree was inoperative. The appellant, however, knew of it, and that in due course an application would be made to make the decree absolute. Although, therefore, the embodiment in the decree *nisi* of the order for payment of per-

manent maintenance was an irregularity, the making of the later order was not contrary to natural justice.

There is another curious circumstance in the case. By sec. 22 of the present Act, which is in similar terms to a provision in the earlier Act, the decree is made absolute, practically automatically, upon request in writing by the petitioner. The decree absolute simply followed the terms of the decree *nisi*, and was made without any formal notice. No doubt the Court was not bound to include in the decree absolute the order for payment of permanent maintenance, and an independent motion ought to have been made. I think that this was an irregularity, but the order was one which it was within the competence of the Court to make and to include in the decree absolute. That was decided by *Hargrave* J. in *Buchanan* v. *Buchanan* (1), and had, indeed, been previously decided in England in 1866 in *Sidney* v. *Sidney* (2). No objection therefore can be taken to both orders being contained in one decree. The Court had jurisdiction to make an order for payment of permanent maintenance. It was made originally at the wrong time. But it was asked for in the petition and (erroneously) inserted in the decree *nisi*. The appellant had notice that application would be made to make the decree absolute. He knew that the decree had been made absolute, as he had since married again. Moreover, that from January 1903 to June 1904 he paid into Court ten instalments of alimony amounting to £59, appears from the records of the Divorce Court, which were produced to us, and which were potentially if not actually before the learned Judge. They purport to have been made under the decree *nisi*, and possibly they do not carry the case much further. It also appears that it is now probably too late to make an original application for permanent alimony under the decree, so that if the order in the decree were set aside the wife would have no means of redress. Ten years have elapsed. I think it would be difficult to believe, even if it were sworn to, which it is not, that the appellant was not aware at the time that this order had been made against him. Under these circumstances I have come to the conclusion that, notwithstanding the irregular way in which the order was made, an application to

(1) 1 N.S.W. S.C.R. N.S. (Div.), 7. (2) L.R. 1 P. & M., 78.

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vary the decree absolute by striking out that part of it would not now be successful. That being so, there was no reason for the learned Judge to refuse to enforce the order. For these reasons I am of opinion that the appeal fails.

BARTON J. and O'CONNOR J. concurred.

Appeal dismissed.

Solicitor, for the appellant, *P. K. White.*
Solicitor, for the respondent, *H. T. Morgan.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

THE SYDNEY HARBOUR TRUST COMMISSIONERS . . . . . DEFENDANTS, } APPELLANTS;

AND

JOHN PATRICK RYAN . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

SYDNEY, *Nov.* 23, 24, 27; *Dec.* 4.

Griffith C.J., Barton and O'Connor JJ.

Master and servant—Action against Sydney Harbour Trust Commissioners—Persons employed at daily or weekly wages—Creation of statutory corporation for public purpose—Department of the Government—Meaning of "employer"—Statute binding Crown—Action against the Crown—Sydney Harbour Trust Act 1900 (*N.S.W.*) (1901, *No.* 1), *sec.* 17—*Employers' Liability Act* 1897 (*N.S.W.*) (*No.* 28), *sec.* 4—*Claims against the Government and Crown Suits Act* 1897 (*N.S.W.*) (*No.* 30).

The Sydney Harbour Trust Commissioners, constituted under the *Sydney Harbour Trust Act* 1900, are the employers of persons engaged by them at